

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1969-2341-2366

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P/S
To Be Argued By
ARTHUR A. MUNISTERI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IIT, an International Investment Trust, and Georges Baden,
Jacques Delvaux and Ernest Lecuit, as Liquidators for IIT, an
International Investment Trust,

Plaintiffs-Appellees-Cross Appellants,

v.

VENCAP, LTD., INTERVENT, INC.,
INTERCAPITAL, N.V., RICHARD C.
PISTELL, CHARLES E. MURPHY, JR.,
DAVID TAYLOR and HAVENS, WANDLESS,
STITT & TIGHE,

Defendants-Appellants-Cross Appellees,

and

WALTER BLACKMAN,

and

ROBERT L. VESCO, MILTON F. MEISSNER,
NORMAN LeBLANC and STANLEY GRAZE,

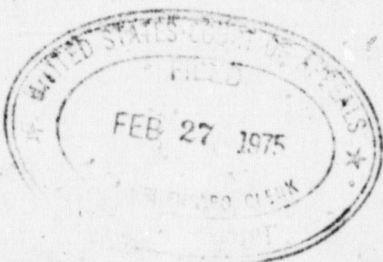
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE
RICHARD C. PISTELL

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 74-1969, 74-2341, 74-2366

IIT, an International Investment Trust, and Georges
Baden, Jacques Delvaux and Ernest Lecuit, as
Liquidators for IIT, an International Investment
Trust,

Plaintiffs-Appellees-Cross-Appellants,

- against -

Vencap, Ltd., Intervent, Inc., Intercapital, N.V.,
Richard C. Pistell, Charles E. Murphy, Jr., David
Taylor and Havens, Wandless, Stitt & Tighe,

Defendants-Appellants-Cross-Appellees,

and

Walter Blackman,

and

Robert L. Vesco, Milton F. Meissner,
Norman LeBlanc and Stanley Graze,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE
RICHARD C. PISTELL

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INTRODUCTION

Plaintiffs' brief is nothing short of an imposition upon this Court: it ignores important arguments, pretends that no adverse findings exist, proclaims false and irrelevant statements and, without embarrassment, constantly repeats the name of the notorious Vesco with no purpose apparent other than to imply guilt by association. It does not deserve any reply from appellants; nevertheless, Pistell submits this reply brief in the hope that the record and issues can be clarified for this Court.

This reply brief will advert to some of the improprieties in the course of its argument, but cannot correct them all. The pervasive flaw of plaintiffs' brief, fortunately, can be seen at once in its "appendix" of "numerous cases in the Southern District involving IOS and related entities, and Vesco and his associates" (IIT Br. 10, App. A).^{*} There is nowhere even a pretense that this meaningless information might help in resolving any issue before this Court. All it does is establish that Pistell and the other appellants are not parties to any other IOS-related cases in the Southern District.

^{*}"IIT Br." denotes pages in the brief of plaintiffs-appellees.

THE ISSUES

There are two main issues presented by this appeal:

1. Do the federal securities laws govern the transaction by which IIT acquired Vencap preference shares in October 1972?
2. Assuming that the federal securities laws do apply, do the district court's findings of fact, and the evidence, support the district court's tentative conclusion that the October 1972 transaction did violate those statutes?

Pistell and the other appellants reviewed the evidence and findings in detail to show that jurisdictional facts were missing, and the conclusion of deception unsupported (Pistell Br. 33-38, 39-46; Vencap Br. 15-37; Havens Br. 19-35).^{*} Plaintiffs simply ignore the argument on the second point and repeat their conspiracy theory, which the district court rejected. With respect to the jurisdictional issue, plaintiffs at least acknowledge appellants' arguments, but use the same technique in answering: they pretend that the district court adopted their fanciful conspiracy theory in toto, whereas in fact it was rejected.

^{*}"Pistell Br.", "Vencap Br." and "Havens Br." denote pages in the principal briefs of defendants-appellants (a) Pistell, (b) Vencap, Intervent, and Intercapital, and (c) Murphy, Taylor and Havens, Wandless, respectively.

POINT I

BY IGNORING THE ISSUE, PLAINTIFFS CONCEDE THAT THERE WAS NO DECEPTION OF IIT

The injunction exists because the district court thought that plaintiffs were likely to prove a violation of the federal securities laws - specifically that IIT was misled into making its investment in Vencap. Pistell and the corporate defendants explained at length why the district court was wrong (Pistell Br. 39-47, Vencap Br. 29-38). Those arguments must have been convincing indeed, for plaintiffs' brief pretends that they don't exist (IIT Br. 48-51).

Plaintiffs do absolutely nothing to show the errors in appellants' arguments or why the district court was correct on this important issue. Their one and one-half pages of "argument" (IIT Br. 50-51) do nothing but take up space. The "argument" cites evidence concerning the manner in which the three-page memorandum was prepared, but having nothing to do with whether anything was misleading, or anyone misled. Next, they argue that negligent misstatements should constitute violations of Rule 10b-5, but conclude that negligence is not involved here.* The section closes with a quotation of uncertain relevance alleged to be "particularly apt." Along the way, one finds such delightfully question-begging phrases as "the blatantly false and misleading 'three page memorandum'" and "a calculated plan to deceive." Of course, "saying so won't make it so."

*Anyway, they are wrong about the law. Lanza v. Drexel & Co., 479 F. 2d 1277, 1305 (en banc, 2d Cir. 1973).

It is undoubtedly difficult to believe that in a matter of such importance a brief could be so cavalier. Surely, in some of the remaining thirty-three pages of argument there must be some effort to support the district court's findings. There is not.

This poverty of justification for the district court's conclusions provides the motive for the irrelevant, false and even scurrilous material that infests plaintiffs' brief.* Most of them arise in response to the following principles, which appear to have guided the preparation of the answering brief.

- a. Drag in Vesco whenever possible and imply guilt by association.
- b. Assert schemes not proven and evidence not offered.
- c. Ignore unfavorable findings of fact and difficult arguments.
- d. State the ultimate conclusions as though they were apodictic.

Instead of defending the district court's conclusion that Vencap misled IIT, plaintiffs apparently have decided to rely upon their conspiracy theory, which the district court rejected and, therefore, cannot be relied upon to sustain the injunction (A954a, n.1; IIT Br. 45-47). But since plaintiffs employ their most vituperative language in making this erroneous argument, a short review of the facts is not unwarranted.

*At the end of this brief we have listed some of the worst of these improprieties.

In essence, plaintiffs claim that IIT's managers deliberately decided to make a gift of the fund's assets to Pistell, which he accepted with knowledge that it was wrongfully done. At the hearing there was no evidence about the transaction from IIT's side: no contemporary documents, no files, no testimony about what kinds of records existed, and no witnesses, even though presumably IIT's previous counsel, both Bahamian and New York, were not fugitives. Pistell denied knowing of any corrupt motive for Graze's decision to have IIT invest in Vencap. Plaintiffs do not dispute that Pistell's background contained some extraordinary financial successes, so there certainly was no lack of a legitimate motive. And the hearing produced no evidence suggesting why Graze, or anyone else, should want to make such a gift to Pistell.* So a finding of conspiracy would require disbelieving a most co-operative witness of good reputation, and in the absence of evidence of a motive for the conspiracy. That is hardly the kind of record upon which this court can overrule the district court on a finding of fact.

Nevertheless, plaintiffs continue to press their conspiracy argument, now by relying heavily upon certain aspects of the

*Although they complain that Vencap's expenses have been too high, plaintiffs do not contend that any of IIT's money found its way back to the fund's former managers.

preference share provisions. In particular, they contend that the redemption provision would certainly prevent IIT from sharing in Vencap's profits. But the lateness of their argument belies the present claim of "potency." Pistell made those provisions public at least as early as April 1973, when he testified as a government witness. Yet in June 1974, when asking the district court for an order to show cause, plaintiffs did not cite the redemption provisions in support of their claim. When they presented the opinion of an expert (Canadian) in Bahamian law, they did not ask him to interpret the practical effect of the redemption provision against the background of Bahamian law. Once the expert had departed, however, they contended that the redemption provision should be read so literally as to permit Vencap's directors to retain all earnings without paying any dividends, for many years, until they finally felt like calling in the preference shares for a mere one year's interest plus the original investment. It is apparent that plaintiffs pass over the fact that the ordinary shares get no dividends at all until the preference shares get their full dividend of \$180,000 plus one-third of remaining earnings.* It is perhaps not so obvious that plaintiffs also ignore the general principles explained by their expert and adverted to in

*Thus, if total profits for a year were \$630,000, the preference shares would have to receive a dividend of \$330,000 before any dividend could be paid to the ordinary shares (\$630,000 - \$180,000 = \$450,000; one-third of \$450,000 = \$150,000; \$180,000 & \$150,000 = \$330,000). At this figure, the preference shares receive more than half the profits.

Pistell's principal brief (p. 46). According to their expert, the apparent powers of the directors must always be exercised in good faith, without purely selfish motives; and plaintiffs do not contest the suggestion in Pistell's principal brief that the "horrible example" set up by plaintiffs could never happen. What is clear beyond peradventure is that one cannot tell just what these provisions mean unless one is familiar with English and Bahamian company law. Plaintiffs' tactics prevented the district court from gaining that familiarity.

POINT II

PLAINTIFFS' DISTORTIONS OF FACT CONFIRM THE LACK OF SUBJECT-MATTER JURISDICTION

The United States Contacts of Any Party Have Nothing to do with the Alleged Fraud

Plaintiffs do take very seriously indeed appellants' contention that the federal securities laws do not apply to this action, for they devote thirteen pages of their brief to attempting a rebuttal (IIT Br. 32-44). The basic flaw is quite simple: the evidence is not there. As with the argument on deception of IIT, plaintiffs prefer not to acknowledge that their pet factual inferences were not adopted by the court.

The reply brief of appellants Murphy, Taylor, and Havens, Wandless addresses itself solely to the issue of subject matter jurisdiction, and Pistell respectfully requests leave to incorporate it by reference herein. In particular, this brief will not attempt to correct the myriad misstatements of fact plaintiffs commit on this issue.

A few points in plaintiffs' brief, however, show rather clearly the sandy foundation of their argument. Plaintiffs and appellants agree that the exception against extraterritoriality defined by Leasco Data Proc. Equipt. Corp. v. Maxwell, 468 F. 2d 1326 (2nd Cir. 1972) depends on whether there was "fraud practiced in this country" (468 F. 2d at 133). What, then, do plaintiffs point to as constituting that fraud?

Plaintiffs list twelve groups of "conduct and activity" within the United States, presumably to show that the standards of Leasco have been met (IIT Br. 39-41). Even a quick glance shows that most of these have nothing to do with IIT's investment in Vencap; those that are connected to the transaction are certainly not fraudulent. Worse, the description of those activities that apparently are connected to it are false, viz., items 8 and 9. There was little evidence about Taylor's drafting in New York and no basis for finding it in any way significant (item 9); there was no evidence at all that either the memorandum or the agreement was drafted in New York (item 8). On this point, plaintiffs claim to rely heavily upon testimony given by Pistell before the present action was begun (IIT Br. 23). Pistell did indeed testify about the memorandum on two separate occasions, about a year apart. In April 1973 he testified for five days and in May 1974 for two days, at the request of the SEC. He was not a party in either proceeding and there was virtually no limit to the subjects inquired into, nor any advance preparation; needless to say, his testimony about the memorandum was a tiny fraction of the total. It is hardly surprising that his testimony before the district court in this case, where the memorandum was specifically mentioned in the complaint, and there was opportunity to prepare, differed somewhat from his earlier testimony. Even so, at no time did Pistell ever testify that the memorandum had been prepared in New York or mailed from New York. See Pistell Br. 18.

Even if Plaintiffs Could Improve Their Evidence,
IIT's Sale of Portfolio Securities Can Provide
No Jurisdiction

The reply brief of Havens, Wandless demonstrates clearly (a) the irrationality of concluding that a corporation of IIT's size needed to sell any securities in order to invest in Vencap, and (b) the inability to trace funds from the sale of IIT securities to the purchase of Vencap stock. The point urged here is that even if, at a full trial, plaintiffs were able to remedy all their factual defects, there would still be no jurisdiction. The point can be seen most clearly by posing a hypothetical, assuming that plaintiffs could eventually prove that (1) specific sales of IIT portfolio securities were sold (2) for the purpose of (3) giving the proceeds to Pistell in the Bahamas. If these three factual elements, now missing, were established, plaintiffs would then be, for jurisdictional purposes, like the following. Suppose a large German corporation with substantial holdings of United States securities, but conducting no business here; it sells on the New York Stock Exchange \$500,000 worth of stock one day and the next day uses the same half-million dollars to purchase, in Japan, a business which goes bankrupt almost immediately. Under plaintiffs' theory, if a German shareholder of the corporation alleged that the sale of United States securities was done in order to benefit the seller of the Japanese business, the United States

District Court would be obliged to assume jurisdiction and apply the federal securities laws. Every foreign corporation that sold portfolio securities in the United States would be obliged to defend in the United States any charge that the proceeds of the sale were misappropriated.

The significance of this demonstration, of course, is that outright dismissal of the complaint should be directed, since even overcoming all these factual hurdles would not confer jurisdiction.

POINT III

IRREPARABLE INJURY: PLAINTIFFS DODGE THE ISSUE AGAIN

Once more plaintiffs reveal their weakness by their silence on a crucial issue. Pistell demonstrated in his principal brief (Pistell Br. 47-51) that plaintiffs failed completely to prove their contention that a judgment would be uncollectable, the only basis upon which an injunction could even remotely be granted upon a claim for money only. Plaintiffs' three pages of argument purporting to show that the prerequisites of a preliminary injunction were satisfied, amount to, quite literally, nothing more than flat assertions of legal principles or of ultimate factual issues (IIT Br. 60-62). Incredible as it must seem, there actually is in fact no reference to the record to support, nor any explanation whatever of the basis for, such question-begging conclusions as:

"Plaintiffs also demonstrated the need for the appointment of a receiver to prevent the further dissipation and waste of Vencap's assets and to take action to retake for Vencap funds wrongfully paid out." (IIT Br. 62).

It is plain that plaintiffs do not take the point seriously. Nevertheless, the requirement that irreparable injury be actually proved is a real one and not trivial. If this court could deny an evidentiary hearing to a plaintiff alleging hundreds of millions of dollars of damages of a continuing nature and difficult of precise proof, it must at the very least insist that a plaintiff who has obtained a hearing not be permitted to

dodge the issue altogether. See SCM v. Xerox, Dkt. No. 74-1585 (2nd Cir., November 4, 1974).

Ironically, plaintiffs do address themselves to this factual issue in an entirely different context, viz., whether Pistell ought to have advanced his own funds to secure a benefit for Vencap after the preliminary injunction had been issued and the receiver appointed. The relevance of the entire paragraph of plaintiffs' brief is far from clear (IIT Br. 66-67), but the particular sentences dealing with Pistell's previous argument are almost incomprehensible:

"Pistell contends that 'plaintiffs argued out of both sides of their mouths' with respect to his financial resources (Brief of Pistell p. 50). This contention misses the mark, but is well based factually since Pistell speaks with a forked tongue."

It seems fairly safe to conclude that plaintiffs are arguing that Pistell is a liar, but it is difficult to see what that has to do with Pistell's undeniably correct assertion that plaintiffs made contradictory arguments before the district court. Moreover, plaintiffs have not chosen to cite any part of the record in which Pistell made the particular contradictory claim of which they accuse him. Plaintiffs have likewise refrained from pointing out why it is "particularly apt" to repeat a quotation from Judge Wyatt addressed to the notorious Vesco and dealing with facts that do not even touch the record in this case. Can plaintiffs be suggesting that if Pistell is

not subjected to the jurisdiction of the district court, and is not found liable, that he will have "flim-flammed" this Court into being the laughing stock of the civilized world? Can plaintiffs be suggesting further that this Court should avoid such a result even if plaintiff, with months to prepare his case and literally bundles of evidence procured by the efforts of the United States government, was unable to produce sufficient evidence for the fraud that everyone "knows" must have happened?

It appears that, on this point, plaintiffs' brief is either confusingly irrelevant or a truly shocking appeal to prejudice and an invitation to infer guilt from association and innuendo.

POINT IV

THE DISTRICT COURT HAD DISCRETION TO
PERMIT VENCAP TO PURSUE ITS VENTURE
IN CAMEROONS.

Plaintiffs have appealed from the district court's decision, recommended by the independent receiver, to permit Vencap funds to be used to obtain an exploration concession in Cameroons. It goes without saying that the correctness of this decision is shown a fortiori by the arguments advanced by defendants on their appeal from the injunction. It remains only to note that plaintiffs do not make clear why they object or why their business judgment should be preferred to Pistell's, the receiver's and the district court's. It should not be forgotten that during the hearing Pistell testified about the nature of the concession, and the evidence contains a substantial geologist's report describing the prospects (A4169a). Of course it's risky, but shouting "pie-in-the-sky" does not aid rational discourse (IIT Br. 64).

CONCLUSION:

The arguments in plaintiffs' brief should be seen for what they are and so labeled. The injunction should be dissolved and the complaint dismissed.

Respectfully submitted,

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APPENDIX

Miscellaneous Errors of Fact, Misleading Statements, and Other Selected Improprieties in Plaintiffs' Brief.

This listing is far from complete. In particular, it omits misstatements which we believe will be adverted to in the reply briefs of other appellants, and items to which this brief has previously referred.

1. Attempts to drag in Vesco. There is no showing of relevance for the long digression purporting to describe Pistell's association with Vesco and other IOS-related persons in Costa Rica (IIT Br. 16-19). In addition, plaintiffs' descriptions contain such inflammatory and unsupported assertions as: "Thus began the episode which proved so fateful for investors in the Dollar Funds" (IIT Br. 17), which apparently refers to events about which there is no evidence in the record. "The involvement is continuing. Pistell saw Vesco in Costa Rica before this action was commenced" (IIT Br. 19, n.). Pistell went to Costa Rica on other business, not to see Vesco, and discussed no business with him. Plaintiffs never even argued that this testimony was suspect (A1755a-56a, 1719a-22a).

Plaintiffs flatly assert (a) Pistell "would have to know" of "other Vesco escapades" (IIT Br. 24); (b) Pistell and his "helpers must have joined Vesco's fraudulent plans and schemes with glee" (IIT Br. 55). These are flat-out accusations of

complicity in schemes without a shred of evidence to support them. For what it is worth, the SEC did indeed accuse Vesco of various schemes, if not escapades, but did not allege that Pistell, Vencap, Blackman or the other appellants were accomplices in any of them.

Plaintiffs actually accuse appellants of distorting the facts by referring to the Paradise Island negotiations as "unrelated to the present action"; they also imply some sinister significance to the fact that there was an "unmistakeable" "tie-in of the \$3,000,000 to Pistell's prior associations with Vesco and his associates" (IIT Br. 23). Of course, Pistell's tirely innocent associations with Resorts International and en- its negotiations with Vesco about Paradise Island resulted in his meeting and becoming friendly with Graze, but the characterization of those negotiations as "unrelated" comes directly from the district court's opinion (A952a, Pistell Br. 14, Havens Br. 11-12).

2. Vencap's loan to Pistell. Despite the accurate account in Pistell's principal brief (pp. 21-22) plaintiffs boldly assert two falsehoods: that Vencap had no security for its loan to Pistell, and that the loan was made "almost immediately upon receipt of the \$3,000,000" (IIT Br. 28, 52). The record citation for the first statement reveals an outrageous attempt to take an incomprehensible statement out of context (A1787a). The loan to Pistell was secured (A593a). Plaintiffs never

challenged Pistell's testimony that his Flag-Redfern stock posted as collateral was worth more than the amount of the loan. With respect to the timing of the loan, the documentary evidence shows that the initial steps were not taken until more than three months after "receipt of the \$3,000,000," there is no contrary evidence, and plaintiffs do not bother to cite to the record (Al641a, 3988a).

3. Vencap's status. Although never raising the issue before, plaintiffs now insinuate Vencap is not a Bahamian corporation simply because it is a "non-resident" Bahamian company (IIT Br. 12-13, 38). They neglect to mention that both resident and non-resident Bahamian companies have the same rights, duties and obligations, and both are equally subject to service or suit in the Bahamas. The only functional difference is for purposes of exchange control. Non-resident companies are permitted much greater freedom in retaining assets in the form of foreign currencies. The classification of "resident" or "non-resident" is made solely for exchange control purposes.

4. Pistell's \$100,000 fee. Plaintiffs simply ignore Pistell's demonstration that there was nothing sinister about his personal use of his own \$100,000 fee (Pistell Br. 26-30). Instead, they casually re-iterate the error by lumping the \$100,000 into Pistell's compensation from Vencap and referring

snidely to his use of "funds in the Vencap treasury as his personal checkbook" (IIT Br. 26, 29, 53). Yet nowhere do they actually attempt to demonstrate that Pistell's contentions on this point are incorrect.

5. Cheap shots. Pistell "claims to reside in Lyford Cay" (IIT Br. 12). There was no contrary evidence and the district court so found (A950a).

"Intercapital has no officers or directors" (IIT Br. 13). Its sole managing director resigned as a direct result of the mere institution of this action (A563-64a).

"On a broader scale than that involved in the present appeal the 'game' is readily apparent" (IIT Br. 54, n.). This is followed by quotes from two books about Cornfeld and Vesco. It is no coincidence that this appeal to prejudice appears in plaintiffs' most fanciful argument on the law.

"...weaseling through loopholes in domestic law jurisdiction." "...the utilization of supposed jurisdictional loopholes to vent fraud and theft upon persons in other nations." "...an intent to dodge the law by bobbing and weaving between national boundaries" (IIT Br. 57, 58). Since the Bahamas are only "a few miles off the coast" (IIT Br. 41), and plaintiffs come all the way from Luxembourg anyway, there appears to be no inconvenience for them to sue in the Bahamas, where there would be no question about jurisdiction. Who is doing the bobbing and weaving?

I, MARION DE ROSA, hereby certify that on February 27, 1975 I served copies of the annexed Reply Brief of Richard C. Pistell by mailing two copies each, first class mail, postage prepaid, to the following attorneys for the other parties to the appeal:

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